

OSTER Researching Services

12897 Colonial Dr. • Mt. Airy, Md. 21774 No.
301-253-6040

Date 5/8/89

Fee \$ 13.00

May 8, 1989

9-128A001 ITC Washington, D. C.

RECORDATION NO. 15320 FILED 1425

MAY 8 1989 - 9 50 AM

INTERSTATE COMMERCE COMMISSION

MAY 8 9 42 AM '89
NOTION OPERATING UNIT

Ms. Mildred Lee
Recordations Unit
Interstate Commerce Commission
12th & Constitution Avenue, N.W.
Washington, D.C. 20423

Dear Ms. Lee:

Enclosed is a Railcar Lease Agreement dated as of January 31, 1989, between the following parties:

Lessor: Helm Financial Corporation
One Embarcadero Center
San Francisco, CA 94111

Lessee: Escanaba & Lake Superior Railroad
Wells, MI 49894

The equipment involved in this transaction is as follows:

Equipment: 10, 70' 100-ton Flatcars
See Schedule "A"

Please record this agreement as a primary document. The filing fee of \$13 is enclosed. Thank you for your kind assistance.

Sincerely,

Mary Ann Oster

Mary Ann Oster
Research Consultant

Enclosure

Completed May 8, 1989

Interstate Commerce Commission
Washington, D.C. 20423

5.8.89

OFFICE OF THE SECRETARY

Mary Ann Oster
Oster Researching Services
12897 Colonial Drive
Mt Airy, Maryland 21771

Dear: **Sir:**

The enclosed document(s) was recorded pursuant to the provisions of Section 11303 of the Interstate Commerce Act, 49 U.S.C. 11303, on **5.8.89**, at **9:50am**, and assigned recordation number(s). **16320**

Sincerely yours,



Noreta R. McGee
Secretary

Enclosure(s)

RAILCAR LEASE AGREEMENT

RECORDATION NO. 15320 FILED 1989
MAY 8 1989 -9 50 AM
INTERSTATE COMMERCE COMMISSION

THIS AGREEMENT, made and entered into as of this 31st day of January, 1989 (hereinafter the "Effective Date") by and between HELM FINANCIAL CORPORATION, a California corporation, hereinafter called "Lessor", and THE ESCANABA & LAKE SUPERIOR RAILROAD, a Michigan corporation hereinafter called "Lessee".

1. Equipment and Lease Charges. Lessee agrees to lease with intent to purchase from Lessor the railcars (hereinafter "Cars") listed in Exhibit A, together with all replacement parts, additions, repairs and accessories incorporated therein and/or affixed thereto.

a. Rental

Rent shall become effective, with regard to each of the Cars, as of the Effective Date, and shall continue in effect, with regard to each of the Cars, until returned to Lessor at the end of the term of this Agreement, as hereafter provided in Article 5. Payment of rent shall be made to Lessor at the address specified in Article 15, or to such other place as Lessor may direct. The first and second rental payments shall be in the amount of [REDACTED] each, payable on January 31, 1989 and February 28, 1989. The third rental payment and the next thirty-five (35) consecutive rental payments in the amount of [REDACTED] per Car per month shall be due on the last day of each month beginning on March 31, 1989. Rent for any Car for any partial month shall be prorated on a daily basis. Any costs incurred by Lessor in collecting rent wrongfully withheld by Lessee, including reasonable attorney fees, will be paid by Lessee.

b. Rental Adjustment in the Event of Modification

Should the E&LS desire to modify the physical structure of any of the Cars, E&LS will pay to Helm the present value of the remaining rental payments up to a maximum of [REDACTED] per Car. This additional payment shall be subtracted from the present value of the remaining rental payments and a new term shall be determined by using the current rental rate of [REDACTED] per Car per month. All present value calculations shall be calculated using a discount rate of [REDACTED]

c. Rental Set-Off

Lessee shall not be entitled to any abatement of rent, reduction thereof or set-off, counterclaim, recoupment or defense against rent or any other amount payable hereunder for any reason whatsoever, including, but not limited to,

abatelements, reductions, set-offs, counterclaims, recoupments or defenses due or alleged to be due by reason of any past, present or future claims of Lessee against Lessor or any other person for any reason whatsoever, except as otherwise provided in Articles 1, 4, 6, and 9 herein; nor shall this Agreement terminate or the obligations of Lessee be otherwise affected by reason of any defect in the condition, design, operation or fitness for use of any Car or damage to or loss of possession or loss of use or destruction of all or any of such Cars from whatever cause and of whatever duration, except as otherwise provided in Article 4 below, or the prohibition of or other restriction against Lessee's use of all or any such Cars, or the interference with such use by any person or entity or the invalidity or unenforceability or lack of due authorization of this Agreement or any insolvency of or the bankruptcy, reorganization or similar proceeding against Lessee.

Lessor covenants that so long as Lessee is not in default hereunder, Lessee shall have and enjoy an unconditional right quietly to enjoy and use all Cars free from any disturbance or interruption of possession arising as a result of any action or inaction, failure of title, or conduct of or by Lessor, or of or by any assignee of its rights hereunder.

2. Delivery of Cars. The Lessee hereby accepts the Cars and acknowledges that each Car is subject to all terms and conditions of this Lease.

3. Warranties and Representation. LESSOR LEASES THE CARS AS IS AND MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND RESPECTING THE CARS WHETHER STATUTORY, WRITTEN, ORAL OR IMPLIED AND LESSOR HAS NOT MADE AND DOES NOT HEREBY MAKE, NOR SHALL IT BE DEEMED BY VIRTUE OF HAVING LEASED THE CARS PURSUANT TO THIS AGREEMENT TO HAVE MADE, ANY REPRESENTATION OR WARRANTY AS TO THE MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, DESIGN OR CONDITION OF, OR AS TO THE QUALITY OF THE WORKMANSHIP IN, THE CARS, ALL OF WHICH ARE EXPRESSLY DISCLAIMED AND LESSOR SHALL NOT BE LIABLE, IN CONTRACT, TORT OR OTHERWISE ON ACCOUNT OF ANY DEFECT, WHETHER HIDDEN, LATENT OR OTHERWISE DISCOVERABLE OR NONDISCOVERABLE RESPECTING ANY CAR. LESSEE ACCORDINGLY AGREES NOT TO ASSERT ANY CLAIM WHATSOEVER AGAINST LESSOR BASED THEREON. LESSEE FURTHER AGREES, REGARDLESS OF CAUSE, NOT TO ASSERT ANY CLAIM WHATSOEVER AGAINST LESSOR FOR LOSS OF ANTICIPATORY PROFITS OR CONSEQUENTIAL DAMAGES.

4. Responsibility for Damage or Destruction of Cars. If any of the Cars are lost, stolen, destroyed, or damaged beyond economic repair (such occurrences to be hereinafter called "Casualty Occurrences") in the opinion of Lessee (except when the Car is in the possession of Lessor), Lessee shall notify Lessor of such Casualty Occurrence within five (5) business days.

Sixty (60) days after advising Lessor of such Casualty Occurrence, Lessee shall pay Lessor a settlement value for the Car or Cars as described in the Casualty Schedule attached hereto as Exhibit B. Rent with respect to any Car shall abate upon the date Lessor is paid for such Casualty Occurrence.

Upon payment by Lessee to Lessor of the settlement value of any Car as hereinabove provided, so long as Lessee is not in default hereunder, such Car shall become the property of the Lessee.

In order to facilitate the sale or other disposition of any Car which becomes Lessee's property as hereinbefore provided, Lessor shall, upon request of Lessee, execute and deliver to Lessee or to Lessee's vendee, assignee or nominee, a bill of sale for such Car, warranting title free and clear of all liens, security interest, and other encumbrances (except such as may have arisen by through or under Lessee during the term of this Agreement) and such other documents as may be required to release such Car from the terms and scope of this Agreement and from any other lien or encumbrance of Lessor's making, undertaking or sufferance, in such forms as may be reasonably required by the Lessee.

5. Return of Cars. Except as provided in Section 14 and 23 hereof, at the expiration or termination of this Agreement as to any Car(s), Lessee will surrender possession of such Car(s), to Lessor by delivering the same to Lessor on the track of Lessee as designated by Lessor, at the sole expense and risk of Lessee. If such Cars are not on the railroad line of Lessee upon termination, any cost or remarking, assembling, delivering, storing and transporting of such Cars to Lessee's railroad line or line of a subsequent lessee shall be borne by Lessee. If such Cars are on the railroad line of Lessee upon expiration or termination or are subsequently returned to Lessee's railroad line, Lessee shall at Lessee's expense and designation within five (5) working days from notification by Lessor remove Lessee's railroad markings from the Cars and place thereon such marking as may be designated by Lessor, at the cost and expense of Lessee. After the removal and replacement of markings, Lessee shall use its best efforts to load such Cars with freight and in any case shall deliver them to a connecting carrier for shipment. Lessee shall provide up to one hundred twenty (120) days free storage on its railroad tracks for Lessor of any terminated Car.

6. Maintenance. Lessee agrees to maintain at its own expense each of the Cars in good condition and repair, in conformity with all applicable laws and regulations including the AAR Code of Rules and FRA Railroad Freight Car Safety Standards.

Lessee will at Lessor's request, take such reasonable action as Lessor may specify to modify operating conditions within Lessee's control which in Lessor's reasonable opinion are causing undue and avoidable wear or damage to the Cars.

Neither party to this Agreement will alter materially the physical structure or allow any third party to alter materially the physical structure of any of the Cars without the other party's written consent. Any part installed or replacements made by Lessee upon the Cars shall be considered accessions to the Cars and title thereto shall be immediately vested in Lessor, without cost or expense to Lessor.

7. Freight and Other Charges. Lessor shall not be obligated for the payment of any switching, freight, or other charges incurred by the movement or the holding of the Cars, either loaded or empty, during the term of this Agreement, all of which will be paid by Lessee. Lessor shall have no right or claim to any per diem, demurrage or other Car hire charges arising out of the use of the Cars and all such charges, as applicable, shall belong and be payable to Lessee.

8. Lettering of Cars. Lessee will supply the reporting marks for the Cars, as indicated in Exhibit A, in accordance with the AAR Code of Rules. Lessee agrees to keep and maintain on the sides of each Car in letters not less than on-half inch in height the words "OWNERSHIP SUBJECT TO A SECURITY AGREEMENT FILED WITH THE INTERSTATE COMMERCE COMMISSION" or any other ownership stencil that currently appears on the Cars.

9. Responsibility for Taxes. Lessee will be liable for all taxes, costs, fines and assessments of every kind upon the Cars, and will file all reports relating thereto; provided, however, that Lessee shall not be responsible for federal or state taxes based upon the income of Lessor.

10. Responsibility for Lading. Lessor shall not be liable for any loss of, or damage to, commodities, or any part thereof, loaded or shipped in the Cars, however such loss or damage shall be caused, or shall result.

11. Recordkeeping; Inspection. Lessee agrees to keep and maintain and make available to Lessor such records of Lessee's use, operation, inspection, repairs and maintenance of each Car while in its possession as shall be reasonably required by Lessor. Lessor, with one (1) day's written notice by such agent or agents as it may designate, shall have the right at all reasonable times to go upon the property of Lessee to inspect any Car while in the possession of Lessee.

12. Indemnification. Lessee agrees to indemnify and hold Lessor harmless from any and all claims, demands, causes of

action, cost, and expenses, including attorney fees, arising directly or indirectly out of the use, custody, control, or operation of the Cars, whether in contract, tort, strict liability in tort or otherwise. In any personal injury action(s) arising from the operation of said Cars naming Lessor as a defendant, Lessee agrees, if Lessor so requests, to undertake the defense and cost associated therewith immediately upon tender of said defense, including payment of any judgement directed against Lessor jointly or severally. Lessee also agrees to pay and indemnify Lessor from any and all penalties, fines, and levies arising from the operation of said Cars under this Agreement. Lessee's obligations hereunder shall survive the termination of this Agreement.

13. Assignment. Lessee shall be entitled to the possession and use of the Cars in accordance with the terms of this Agreement. Except as herein provided, Lessee will not assign, transfer, encumber or otherwise dispose of this lease, the Cars or any part thereof, or sublet any Car without the prior written consent of Lessor. Lessee will not permit or suffer any encumbrances or liens to be entered or levied upon any Car, other than such as may arise by, through, or under Lessor or any assignee of Lessor's rights hereunder.

Lessee acknowledges and understands that Lessor may, without notice to Lessee, assign its interest under this Agreement in and to the Cars to a bank or other lending institution as security for one or more loans. Lessee agrees, in the event of any such assignment and upon notice thereof from Lessor, and only in the event of such assignment to one or more such assignees: (i) to recognize such assignments; (ii) to make all payments of Rent and other amounts due under the Agreement as so assigned directly to the assignee identified in such notice to or to its designee; (iii) to accept the directions or demands of such assignee in place of those of the Lessor; (iv) to surrender the Cars to such assignee upon termination of this Agreement; (v) that, in the event of such assignment and except as otherwise provided in Articles 4, 5, 6, or 9, Lessee's obligations hereunder with respect to payment of Rent shall not be subject to any reduction, abatement, defense, set-off, counter-claim or recoupment for any reason whatsoever; (vi) except as otherwise provided in Articles 2, 4 (with respect to any Car which becomes Lessee's property), 5, 6, and Article 16, not to terminate this Agreement; provided, however, nothing contained in this Article 13 shall relieve Lessor from its obligations to Lessee hereunder, nor shall any assignee hereof be relieved of the obligation to release its interests in any Car to facilitate Lessor's obligations contained in the second paragraph of Article 4 hereof.

14. Remedies. If the Lessee, within five (5) business days after notice, fails to carry out and perform any of the obligations on its part to be performed under this Agreement, or

if any proceedings shall be commenced by or against Lessee for any relief under any bankruptcy, or insolvency, law or any law relating to the relief of debtors, readjustment or indebtedness, reorganization to the relief of debtors, readjustment of indebtedness, and in any of said events, Lessor shall have all rights available to it at law or in equity, including without limitation the right immediately to declare all sums due and to become due hereunder immediately due and payable, to repossess the Cars, to remove the Cars from the Lessee's service, to terminate this Agreement, and recover any and all damages sustained as a result of Lessee's fault. If Lessor shall terminate this Agreement pursuant to this Article 14, Lessee shall remain liable for all unpaid rent and other amounts due hereunder. The rights and remedies herein given to Lessor shall in no way limit its other rights and remedies given or provided by law or in equity.

15. Place of Payment of Rent. Lessee shall direct payment of the monthly rent to the following address:

Helm Financial Corporation
One Embarcadero Center, 35th Floor
San Francisco, CA 94111

16. Term of Agreement. This Agreement shall remain in full force until it shall have been terminated as to all of the Cars as provided herein. The term of this Agreement with respect to all of the Cars shall be for thirty-eight (38) months commencing upon the Effective Date except, the term of this Agreement may be modified with regards to each Car (individually) subject to the terms and conditions of Article 1b.

17. Notice. Any notice to be given under this Agreement shall be given by certified mail in the following manner:

(a) Notice from Lessor to Lessee shall be sent to:

Mr. John C. Larkin
President
Escanaba & Lake Superior Railroad
Wells, MI 49894

(b) Notices from Lessee to Lessor shall be sent to:

Helm Financial Corporation
One Embarcadero Center, 35th Floor
San Francisco, CA 94111
ATTN: President

or to such other address as Lessor may from time to time indicate by written notice to Lessee.

18. Insurance.

(a) All risk of loss of, damage to or destruction of the Cars shall at all times be on Lessee except for loss, damage or destruction resulting from a negligent act or omission of Lessor, its officers, employees, agents, representatives, assignees, and/or successors.

(b) Any insurance policies provided by Lessee hereunder shall (i) be issued by insurance carriers of recognized responsibility, (ii) cover the interest of Lessee and Lessor and protect Lessee and Lessor in respect of risk arising out of the condition, maintenance, use, ownership and operation of the Cars, (iii) provide that the insurance carrier give at least thirty (30) days' prior notice to Lessor in the event of cancellation or material alteration in coverage, (iv) provide that in respect of the interest of the Lessor in such policies, the insurance shall not be invalidated by an action or inaction of Lessee and shall insure Lessor's interest as it appears regardless of any breach or violation by Lessee of any warranty, declaration or condition contained in such policies, and shall include a minimum of [REDACTED] for public liability which Lessor might incur by reason of the operation of the Cars. The policies shall also include coverage for property an amount to cover the settlement value as defined in Article 4.

19. Execution. This Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original, and such counterparts together shall constitute but one and the same contract. This Agreement may be signed in separate counterparts as long as each party hereto shall have signed at least one counterpart.

20. Governing Law. This Agreement shall be governed by California law.

21. Amendments. There shall be no amendments to this Agreement without the consent of the Lessor and Lessee.

22. Late Charges. Delinquent payments shall bear interest at the rate of [REDACTED] per month, if not prohibited by law, otherwise at the highest lawful contract rate.

23. Purchase Option. The Lessor shall extend to the Lessee a purchase option at the expiration of this Agreement in the amount of [REDACTED] per Car on all but not less than all of the ten (10) Cars described in Exhibit A so long as the following conditions are met:

(a) Lessee is not in default under this Agreement.

(b) The monthly rents paid to the Lessor relating to all but not less than all of the ten (10) Cars described in Exhibit A shall have been made pursuant to Article 1 herein.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed and delivered that day and year first above written.

HELM FINANCIAL CORPORATION
LESSOR

By: 

Title: President

Date: 4-14-89

THE ESCANABA AND LAKE
SUPERIOR RAILROAD
LESSEE

By: 

Title: President

Date: March 10, 1989

STATE OF CALIFORNIA)
)
COUNTY OF SAN FRANCISCO)

On this 14th day of April, 1989, before me personally appeared Richard C. Kirchner, to me personally known, who, being by me duly sworn, says that he is President of HELM FINANCIAL CORPORATION, that said instrument was signed and sealed on behalf of said corporation and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

Elena F Gary
Notary Public

My Commission Expires: July 24, 1992

[Notarial Seal]



STATE OF Michigan)
)
COUNTY OF Delta)

On this 10th day of March, 1989, before me personally appeared John Furber, to me personally known, who, being by me duly sworn, says that he is President of Escanaba & Lake Superior Railroad, that said instrument was signed and sealed on behalf of said corporation by authority of its President and Directors and he acknowledged that the execution of the foregoing instrument was the free act and deed of said corporation.

James J. Chouinard, Sr.
Notary Public

My Commission Expires: February 22, 1992

[Notarial Seal]

JAMES J. CHOUINARD, SR.
Notary Public, Delta County, Michigan
My Commission Expires February 22, 1992

EXHIBIT A
EQUIPMENT DESCRIPTION

<u>Description</u>	<u>Number of Cars</u>	<u>Lease Term</u>	<u>Lease Charges</u>	<u>Car Markings</u>
70', 100 Ton Bulkhead Flat Cars Built in 1967 by Thrall.	10			ELS 61703 61718 61725 61733 61734 61736 61748 979017 979024 979028

EXHIBIT B
CASUALTY SCHEDULE

PAYMENT
NUMBER

CASUALTY

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